

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE STATE OF OHIO, ex rel. DAVE YOST,
OHIO ATTORNEY GENERAL,

and

THE UNITED STATES OF AMERICA,

Plaintiffs,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
and NORFOLK SOUTHERN CORPORATION,

Defendants,

Civil Action No. 4:23CV517

Hon. John R. Adams

JOINT STATUS REPORT AND DISCOVERY PLAN

1. Pursuant to Federal Rule of Civil Procedure 26(f) and LR 16.3(b)(3), and in accordance with the Court’s March 12 order, the parties submit the following report and discovery plan supplementing the parties’ reports of May 5, 2023 and July 12, 2023:

2. **Status Update**

A. Site Cleanup

Since the February 2023 issuance of EPA’s CERCLA Unilateral Administrative Order (“UAO”) to Norfolk Southern, EPA has been directing and overseeing the extensive cleanup activities by Norfolk Southern. Cleanup efforts began following the initial response and have been ongoing ever since.

On October 18, 2023, EPA issued a Clean Water Act Administrative Order (“CWA Order”) requiring Norfolk Southern to further evaluate the sediments and sheen in Leslie Run

and Sulphur Run, to remove sediment from culverts located in Sulphur Run, and to provide a workplan to address the oil remaining in the sediment. Cleanup of sediments in Sulphur Run began on March 25, 2024, and cleanup of sediments in downstream Leslie Run will start in the late spring or summer.

As of April 1, 2024, more than 177,076 tons of contaminated soil and more than 56.2 million gallons of contaminated liquid have been shipped offsite for disposal. EPA and Norfolk Southern have collected more than 28,000 air samples, more than 230 sediment samples, and more than 6,300 soil samples. The EPA's state and local partners, along with Norfolk Southern, have collected more than 300 monitoring-well samples, 3,800 surface water samples, and more than 1,300 private well samples; and they have conducted 55 rounds (more than 280 samples) of drinking water sampling from the public well supply.

Available data continue to show that no contaminants of concern have been detected at levels of concern in the air in the affected communities at sustained levels since the evacuation order was lifted on February 8, 2023. Norfolk Southern has engaged in 24-hour air monitoring at 23 stations in the community between approximately February 4, 2023 and October 30, 2023, and conducted more than 600 indoor air screenings.

Norfolk Southern and government teams have monitored a network of 33 groundwater monitoring wells around the derailment site and 25 sentinel wells throughout the area, and further analyzed hundreds of samples. Testing of municipal drinking water—both pre-treatment and post-treatment—show no detection of contaminants associated with the derailment. Sampling indicates that residential groundwater wells have not been affected by chemicals associated with the derailment.

As of October 30, 2023, Norfolk Southern completed source removal at the derailment site. Confirmatory sampling is ongoing at the site, with more than 3,400 confirmation samples collected.

Biological surveys conducted under the direction of the Ohio EPA and U.S. Fish and Wildlife Service monitoring fish and macroinvertebrate populations show that “those populations have largely returned to pre-spill conditions.”¹ Additional habitat analysis of mussel and macroinvertebrate populations are ongoing.

B. Litigation

The parties met and conferred on March 22, 2024 to develop a discovery plan updating the parties’ proposal submitted to the Court on July 12, 2023, ECF No. 38. The below discovery plan moves the prior proposed deadlines back a proportionate number of days between the date of the cancelled July 12, 2023 case management conference and the rescheduled April 10, 2024 case management conference, with the exception of the Defendant’s proposed approach for expert deadlines, and the dispositive motion deadline, which would be extended one week to account for the New Years Day holiday.

Separately, on March 6, 2024, the Court dismissed Norfolk Southern’s claims against six Third-Party Defendants. *See* ECF 113. On March 26, 2024, Norfolk Southern moved pursuant to Fed. R. Civ. P. 54(b) for entry of partial final judgment with respect to these dismissed claims. *See* ECF 121. It is Norfolk Southern’s position that granting Norfolk Southern’s motion will not affect the parties’ proposed discovery schedule. Norfolk Southern also states that the third party claims do not affect the timing or merits of the government Plaintiffs’ first-party claims in this action, and permitting an appeal to move forward will not impede the progress of discovery.

¹ *Water Quality in Leslie Run and Sulphur Run*, Ohio Env’t Prot. Agency, Div. of Surface Water (Oct. 2023), <https://epa.ohio.gov/static/Portals/47/citizen/StreamUpdate.pdf>; *What Are Current Results for Ohio EPA’s Stream and Fish Monitoring?*, U.S. Env’t Prot. Agency (last updated Nov. 1, 2023), <https://www.epa.gov/east-palestine-oh-train-derailment/what-are-current-results-ohio-epas-stream-and-fish-monitoring>.

3. **Discovery Plan**

(a) The parties propose that Fact Discovery conclude May 1, 2025. Per the Court's stipulated Discovery Order, each party must seek leave of court to depose more than 15 witnesses from another party; in other words, the United States and the State of Ohio may take 15 depositions of Norfolk Southern each, and Norfolk Southern may take 15 depositions of the United States and 15 depositions of the State of Ohio. *See* ECF No. 27 at 23.

(b) The parties have identified the following individuals as early deponents:

(i) Norfolk Southern

1. Peggy Clark – Columbiana County EMA
2. Trent Conaway – EP Mayor
3. Ralph Dollhopf – US EPA
4. Keith Drabick – EP Fire Chief
5. Mike Eberle – OH EPA
6. Rick Hackley - US EPA
7. Rich Henry – US EPA
8. James Justice – US EPA
9. Jack Kelly – US EPA
10. Michelle Kerr – US EPA
11. Amy Klei – OH EPA
12. Kurt Kollar – OH EPA
13. Andy McGuire – US EPA
14. Paul Ruesch – US EPA
15. Anne Vogel – OH EPA

(ii) The State of Ohio

1. Robert Wood – Norfolk Southern
2. Scott Deutsch – Norfolk Southern
3. Jared Hopewell – Norfolk Southern
4. Keith Drabick – EP Fire Chief
5. Trent Conaway – EP Mayor
6. Peggy Clark – Columbiana County EMA
7. Charles Day – Specialized Response Solutions
8. Drew McCarty – Specialized Professional Services, Inc.
9. Steve Smith – OxyVinyls
10. Paul Thomas – OxyVinyls

(iii) The United States

1. Robert Wood – Norfolk Southern
2. Daniel Hunt – Norfolk Southern
3. Robert Scoble – Norfolk Southern

4. Jon Rettig – Norfolk Southern
5. Scott Deutsch – Norfolk Southern
6. Steven Aufdenkampe – Norfolk Southern
7. Drew McCarty – Specialized Professional Services, Inc.

(c) Initial requests for production, interrogatories, and requests for admission may be served following the April 10, 2024 case management conference, unless instructed otherwise by the Court, with initial responses due 60 days after service and further productions in accordance with the Order and Stipulation Regarding Discovery Procedures, ECF No. 27.

(d) Depositions may begin on July 15, 2024, and may continue concurrently with written discovery.

(e) The parties request that the Court set a further status conference on or about October 1, 2024.

(f) The parties recommend the following schedule for Expert Discovery:

(i) Norfolk Southern proposes expert report deadlines as follows:

Plaintiffs' Initial Expert Report(s): June 2, 2025

Defendants' Rebuttal Expert Report(s): August 4, 2025

(ii) The United States and Ohio propose expert report deadlines as follows:

Plaintiffs' Initial Expert Report(s) Due: June 2, 2025

Defendants' Rebuttal Expert Report(s) Due: July 2, 2025

Plaintiffs' Rebuttal Expert Report(s) Due: August 4, 2025

(iii) The parties propose an Expert Deposition and Expert Discovery Completion Date of October 28, 2025.

(g) The parties propose a deadline to file dispositive motions of January 8, 2026.

Date: April 3, 2024

Respectfully submitted,

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